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U.S. DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

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8 **UNITED STATES DISTRICT COURT**  
9 **NORTHERN DISTRICT OF CALIFORNIA**  
10 **SAN FRANCISCO DIVISION**

11  
12 **MARK ANTOINE FOSTER,**  
13 **Plaintiff,**

14 **vs.**

15 **MORGAN LEWIS & BOKIUS, LLP and**  
16 **ERIC MECKLEY, an individual**  
17 **and DOES 1 Through 81**  
18 **Defendants**

Case No. **C-08- 1337 MHP**  
**PLAINTIFF'S REPLY IN**  
**SUPPORT OF MOTION TO REMAND**  
**ACTION TO STATE COURT OPPOSING**  
**DEFENDANT'S OPPOSITION; MEMO**  
**OF PTS & AUTHORITIES IN SUPPORT**  
**THEREOF**

**Date: April 28, 2008**  
**Time: 2:00 p.m.**

19 **I. Introduction**

20 Plaintiff MARK ANTOINE FOSTER hereby submits his SECOND reply to Defendant's  
21 Opposition to his motion to remand the above titled action to state court.

22 **MEMORANDUM OF POINTS AND AUTHORITIES**

23 **II. Rebuttal Argument**

24  
25 PLAINTIFF'S SECOND REPLY IN SUPPORT OF MOTION TO REMAND ACTION TO  
STATE COURT OPPOSING DEFENDANT'S OPPOSITION

C- 08-1337 MHP

**A. Federal Question**

**First, Plaintiff reinstates all the grounds or arguments alleged in his first reply to Defendants' opposition to remand the above titled case and now respond to Defendants' claim that Plaintiff's original case no C -08-0733 should not be remanded.**

**B. Pendent/Supplemental Jurisdiction**

**In response to Defendant's claim that the court should exercise supplemental jurisdiction over his remaining state law claims because they arise out of the same nucleus of operative facts is groundless;** because for this theory to work, Plaintiff's ADA claim must have substance sufficient to confer subject matter jurisdiction, which it does not. Plaintiff's ADA claim is not sufficiently substantial to support the exercise of federal jurisdiction because resolution for the disability discrimination is not dependent on any interpretation of federal law regarding disability discrimination, because resolution of the disability discrimination is available under FEHA for Plaintiff. In other words, Plaintiff's state law claims do not turn or don't need to turn to substantial questions of federal law for resolution of this case. The district court jurisdiction is not mandatory, and no special circumstance exists that warrants the district court's participation.

(see *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing*) which states "Federal- question jurisdiction is usually invoked by plaintiff's pleading a cause of action created by federal law, but this court has also long recognized that such jurisdiction will lie over some state-law claims that implicate significant federal issues, see e.g. *Smith v. Kansas City Title and Trust C.*, 255 U.S. 180. Such federal jurisdiction demands not only a contested issue, but a substantial one.

**Plaintiff's ADA claim is not a significant federal issue that has to be addressed by the**

1 district court, because discrimination under FEHA was founded or created from the ADA's laws  
2 regarding disability discrimination, and the purpose of its creation was to give claimants the  
3 opportunity to seek resolution for disability discrimination from the state. Therefore, this case  
4 does not warrant federal jurisdiction as it did in *Grable & Sons v. Darue*.

5 Furthermore, pursuant to 28 U.S.C.S. 1367(c), the district court may decline to exercise  
6 supplemental jurisdiction over a claim under subsection (a) if – (1) the claim raises a novel or  
7 complex issue of state law, (2) the claim substantially predominates over the claim or claims  
8 over which the district court has original jurisdiction, (3) the district court has dismissed all  
9 claims over which it had original jurisdiction, or (4) in exceptional circumstances, there are other  
10 compelling reasons for declining jurisdiction.

11 In *United Mine Workers v. Gibbs*, broadly authorized the federal courts to assert  
12 jurisdiction over state law claims when “[t]he state and federal claims . . . derive from a common  
13 nucleus of operative fact”, the claims are such that a plaintiff “would ordinarily be expected to  
14 try them all in one judicial proceeding,” *and the federal issues are “substantial [].* “*Id.* At 725,  
15 86 S.Ct. at 1138. These *three* factors confer power on the federal courts under Article III to hear  
16 the entire “constitutional” case. See *id.* The court added critically, however, that: [such] power  
17 need not be exercised in every case in which it is found to exist. It has consistently been  
18 recognized that pendant jurisdiction is a doctrine of discretion, not of plaintiff’s right. Its  
19 justification lies in considerations of judicial economy, convenience and fairness to litigants.

20 *Id.* At 726, 86 S. Ct. at 1139 (footnote omitted) Applying this Standard, the Court listed  
21 several situations in which declining pendent jurisdiction would be appropriate: (1) when  
22 “[n]eedless decisions of state law should be avoided”, when the federal claims are dismissed  
23 before trial, or during the course of a case, when it appears “that a state law claim constitutes the

1 real body of a case, to which the federal claim is only an appendage; (3) when “state issues  
 2 substantially predominate, whether in terms of proof, of the scope of the issues raised, or of the  
 3 comprehensiveness of the remedy sought” and finally (4) when there are reasons” independent of  
 4 jurisdictional considerations; such as the likelihood of jury confusion in treating divergent legal  
 5 theories of relief.” Id at 726 27, 86 S. Ct. at 1139.

6 **1. Plaintiff’s claim substantially predominates over the claim or claims over which**  
 7 **the district court has original jurisdiction, which satisfies requirement number (3) of the**  
 8 **Gibbs’s test of several reasons the district court can decline pendant jurisdiction.**

9 Plaintiff stated in his motion to sever, on page 8, lines 17 through 19, “Plaintiff’s claims  
 10 or causes of action are only questions of state law, and Plaintiff need not rely on federal law for  
 11 remedy for Defendants’ disability discrimination violation”, as he can seek remedy under FEHA  
 12 or the Unruh.

13 “The presence of underlying federal issue does not create federal questions jurisdictions  
 14 over a well pleaded state law claims” Hall v. North American Van Lines Inc., 476 F. 3d 683.

15 Plaintiff’s complaint includes a Federal question, but it is clear and common sense that  
 16 the state law causes of action predominate, especially in light of the fact that Plaintiff has moved  
 17 to dismiss his ADA claim pursuant to Rule 41(a) (2), and the court may decline to exercise  
 18 supplemental jurisdiction pursuant to 28 U.S.C.A. 1367(c)

19 Plaintiff’s ADA claim would not have existed if the acts of retaliation, harassment and  
 20 constructive discharge claimed under FEHA had not taken place first, as they were a prerequisite  
 21 to the disability discrimination in this particular case. Therefore, Plaintiff’s state causes of action  
 22 predominate over the ADA claim, especially in light of the fact that Plaintiff alleged the same  
 23 acts of disability discrimination under FEHA and the Unruh, and can seek or desires to seek  
 24



remedy under these state bodies of law.

**2. The district court has the authority and Plaintiff has the right to dismiss his ADA claim.**

“Certainly, if the federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well. Similarly, if it appears that the state issues substantially predominate, whether in terms of proof, of the scope of the issues raised, or of the comprehensiveness of the remedy sought, the state claims may be dismissed without prejudice and left for resolution to state tribunals.” *United Mine Workers v. Gibbs*, also see Note, *supra* note 11, at 1025-1026; *Wham-O-Mfg. Co. v Paradise Mfg. Co.* 327 F. 2d 748, 752-754 (9<sup>th</sup> Cir 1964).

“Plaintiff is master of his complaint and if he can maintain his claims on both state and federal grounds, he may ignore the federal question, assert only state claims, and defeat removal.” *Duncan v. Stuetzle* 76 F. 3d 1480, 1495 (9<sup>th</sup> Cir 1996).

“Plaintiff is master of his complaint and may avoid Federal Jurisdiction by exclusive reliance on state law”

Plaintiff has moved to dismiss his ADA claim and relies exclusively on state law.

**3. Plaintiff's ADA claim is only an appendage to his state law claims; which satisfies requirement number (2) of the Gibbs's test of several reasons the district court can decline pendant jurisdiction.**

Appendage is defined as: something added as an accessory to or the substantial part of another thing. See *American Cannel Coal Co. Indiana Cotton Mills* 78 Ind. App 115, 134 N.E. 891, 893.

Plaintiff added the ADA claim but did not need to too acquire remedy, as it is just an

1 accessory or a subordinate part of the disability discrimination to help explain the validity of it.

2 **4. Plaintiff's state law issues substantially predominate both on terms of proof of the**  
 3 **scope of the issues raised and the comprehensiveness of the remedy sought which also**  
 4 **satisfies number (3) of the Gibb's test.**

5 Plaintiff alleges that it is clear both in terms of proof of the scope of the issues raised and  
 6 the comprehensiveness remedy sought that his state law issues predominate. For example, (1) it  
 7 is clear that the issues raised are issues of state law, (2) it is clearly understood that plaintiff  
 8 seeks remedy solely under state law.

9 **5. Even if Plaintiff's ADA claim was not dismissed the court could still decline to**  
 10 **take the case from state court; as this may be a compelling reason for declining jurisdiction**  
 11 **satisfying Gibb's (4) reason to decline jurisdiction.**

12 People of the State of California v. H&R Block, United States District Court For the  
 13 Northern District of California, Case no. C06-2058 SC. [T]he presence of a disputed issue and  
 14 the ostensible importance of a federal forum are never necessarily dispositive; there must always  
 15 be an assessment of any disruptive portent in[14] exercising federal jurisdiction. " Grable, 125 S.  
 16 CT. at2368. In this case brought by the state of California in a California state court to enforce  
 17 California laws for conduct which occurred in California and which allegedly victimized  
 18 California citizens, the "disruptive portent" is stark. Id.; see Franchise Tax Board, 103 S. Ct at  
 19 2853, n 22; State of Arkansas v. Kansas & Texas Coal Co., 183 U.S. 185, 189, 22 S. Ct. 47, 46  
 20 L. Ed 144 (1901); Barry Friedman, under the law of Federal Jurisdiction; Allocating Cases  
 21 Between Federal and State Claims, 104 Colum. L. Rev 1211, 1242 (2004) ( "A sovereign's  
 22 interest in enforcement encompasses defining the laws or rules that govern society, seeing that  
 23 those laws and rules are obeyed, and punishing those who transgress them.

1 This enforcement interest is a quintessential aspect of sovereignty... The principle that a  
2 state's enforcement interest may justify litigation in state court encounters virtual no dissent.

3  
4 **III. Conclusion**

5 Based on the forgoing, Plaintiff respectfully requests that Defendant's Opposition to his  
6 Motion to remand his original case be overruled, and Plaintiff's original case no. 08-0733 should  
7 be remanded to state court.

8  
9 Date:

*April 16, 2008*

*Mark A. Foster*  
Mark Antoine Foster, In Pro Per